MISCELLANY.

A WONDERFUL RECORD.—A statement of the business transacted by the Supreme Court of Appeals of Virginia for the term just closed, beginning November, 1904, and ending March 28, 1905.

Whole number of cases		113
Final judgments	106	
Continued	7	
	—	113

RICHMOND CHANCERY COURT PRACTICE.—Rules which the gentlemen of the Bar are requested to observe in practice in the Chancery Court of the city of Richmond:

1. Attorneys practicing in this Court are not accepted as sureties on official bonds.

2. No appointments for hearing motions or arguments of causes will be made for Saturdays.

3. Probate motions and other uncontested motions will be heard at ten o'clock, and not after eleven o'clock.

4. Decrees paying out money will provide that Charles O. Saville as a Special commissioner appointed for the purpose shall draw the checks; and the checks will not be delivered until the orders are signed by the Judge.

5. Fees allowed to real estate auctioneers conducting court sales are regulated by the order of April 14, 1899 (see 10 Virginia Law Register, p. 1037); and fees allowed to bonding and trust companies acting as sureties on fiduciary bonds are regulated by the order of July 29, 1896.

6. Arguments in contested matters are to begin at eleven o'clock unless otherwise directed.

7. The clerk will not entertain probate motions except in the vacation of the court.

8. Attorneys making motions on the probate side of the court are requested to furnish the clerk with a written memorandum of the facts necessary for the preparation of the court order. They will also conduct the examination of the witnesses produced to support the motion.

9. Motions for the appointment of an administrator (other than a husband or wife) made by one distributee within less than thirty days after the death of an intestate must be after notice to all other distributees.

10. The rough draft of decrees must be shown to all counsel interested in the decree, and should be endorsed by them as well as counsel asking the entry of the decree.

THE WYTHEVILLE LAW EXAMINATION—A CHANGE.—For reasons appearing to the court, it is ordered that the Bar examination at Wytheville be held this year on Friday, the twenty-third day of June, and thereafter on the third Friday after the first Tuesday in June in each year until otherwise ordered.

CHRISTIAN SCIENCE AND THE CRIMINAL LAW.—In *Speed* v. *Tomlinson*, 59 Atlantic Reporter, 376, wherein the plaintiff sued a Christian Science healer for damages for negligence and deceit in making her believe that appendicitis could be healed according to Christian Science principles, the plaintiff was defeated, the court rendering an extensive opinion, holding that the intelligent and voluntary consent to follow the advice and abide by the result of the prayers of a Christian Science healer preclude a recovery of damages for negligence, based on the ground that public policy is opposed to such treatment.

On reargument of the case, Young J., of the New Hampshire Supreme Court added the following caution, squinting at the application of the criminal law of the State in such cases:

"It does not follow, as a matter of law, from the fact that the plaintiff cannot recover in this action on the count in negligence, that the defendant would not have been guilty of manslaughter if the plaintiff had died from the effects of his treatment. If he had been indicted under the provisions of section 8, chap. 278, Pub. Stat. 1891, the State would base its right of action on his failure to perform a duty the law imposed on him for its benefit. The State has a direct interest in the lives and health of all its citizens. Every one who has to do with the lives and health of others not only owes the individuals with whom he comes in contact a legal duty, but also owes the State the duty of using ordinary care to do nothing which will endanger their lives or health. In an action by the State, it would be no answer to show that if the deceased had used ordinary care to avoid being injured he would not have died; for the defendant is not indicted for his failure to perform a duty the law imposed on him for the deceased's benefit, but for his failure to perform one imposed on him for the benefit of the State. It is no more an answer in such an action to show that, notwithstanding the defendant's fault, death would not have resulted if the deceased had used ordinary care to avoid being injured than it would be in an action against one of two joint tort feasors to show that, notwithstanding the defendant's negligence, the plaintiff would not have been injured if the other had done his duty: *State* v. *Center*, 35 Vt, 378; *Commonwealth* v. *Collberg*, 119 Mass. 350, 20 Am. Rep. 328; *Commonwealth* v. *Pierce*, 138 Mass. 165, 52 Am. Rep. 264; *State* v. *Hurdister*, 38 Ark. 605, 42 Am. Rep. 5; *Rex* v. *Walker*, 1 C. & P. 320; *Rex* v. *Long*, 4 C. & P. 423 The conclusion that the plaintiff's intelligent and voluntary consent to follow the defendant's advice and abide the result of his prayers in an answer to her claim for damages on the count in negligence, previously announced, is reaffirmed."—*National Corporation Reporter.*

See article on "Christian Science and the Law," 10 Va. Law Reg. 285.

AMBIGUOUS USE OF THE WORD "SECTION" IN CLAUSE 141, TAX BILL, VIRGINIA CODE, 1904, PP. 2253–2262.—The writer has once before criticised the Tax Bill, in that the clauses thereof are not subdivided and given appropriate titles. See 10 Va. Law Reg. 935 (February number). This criticism is especially applicable to clause 141, the heading of which is "Liquor License," and which has no further title nor sub-titles. The lack of subdivisions has led the framers thereof to use the term "section" ambiguously. On page 2254, Va. Code 1904, after having defined licences to sell by wholesale, licenses to sell by retail,

licenses to keep an ordinary, and having made it necessary for persons wishing to engage in any kind of liquor business to get a license, the Tax Bill then provides: "A violation of the provisions of this *section* shall be deemed a misdemeanor, and shall be punished by a fine of not less than twenty dollars, and, in the discretion of the court, by imprisonment not exceeding twelve months." As subsequent provisions of clause 141 contain penalties different from the one quoted, it is evident that the word *section* means the paragraph of clause 141 in which it is contained, and that the provision applies to the offenses previously defined in that paragraph.

On page 2261 we find the following: "Any person violating any of the provisions of or failing to comply with any of the requirements of this *section* shall, unless otherwise provided herein, be deemed guilty of a misdemeanor, and be fined not less than fifty dollars nor more than one hundred dollars for each offense, and in addition he may, in the discretion of the jury, be imprisoned not more than sixty days." This seems to be intended as a blanket provision to cover all offenses defined by clause 141, where no specific penalty is provided. It is contained in a separate paragraph; therefore the word *section* cannot in this case refer to any paragraph, and must be taken to refer to the whole clause or division of the Tax Bill numbered 141, otherwise it has no meaning at all.

The same use of the word *section, i. e*, meaning *clause* 141, occurs on page 2261, where it is provided: "This section shall not be construed to repeal or in any wise change the provisions of the charter of any town or city in the State touching the granting of licenses;" and again, on page 2262: "Nothing in this section shall be construed as licensing any person . . . . . to sell wood alcohol, or any mixture thereof, as a beverage . . . . ."

The writer wishes to reiterate what was said before: That the whole Tax Bill ought to be analyzed and subdivided; that adequate titles and sub-titles should be prefixed respectively to the divisions and subdivisions; and that when the State sends copies of the Tax Bill to her officers she should prefix to the same a table of contents and suffix a complete and thorough-going index, otherwise she cannot expect her officers to be familiar with, much less carry into execution, her laws.

C. B. G.

COSTS — CONFUSION OF VIRGINIA STATUTES THEREON — SUGGESTED CHANGES — SECS. 3500, 3505, 1671, 1671a, 3535, VA. CODE 1904, CRITICISED. — The writer has had occasion recently to examine our statutes on the subject of *Costs* and especially *Costs in a Magistrate's Court*. "Out of the abundance of the heart the mouth speaketh," so the Good Book informs us, and experience teaches that under such circumstances the mouth sometimes uses strong English,—which the Good Book condemns. However that may be, it is sufficient for present purposes to say that the statutes on *costs* are in a terribly murky condition and far from being so clear that "he who runs may read." And truly, if there is any part of the law which ought to be clear, easy to find, settled, and unambiguous, it ought to be that part which all the officers of the court, including attorneys-at-law, have to use daily, and yet the writer ventures to say that, with the possible exception of some

clerks, there is no man in the State of Virginia today who can find definitely all the law applicable to the fees of justices of the peace; yea, further, that not even justices and clerks can be certain in all cases to what fees the justices are entitled. For example:

Sec. 3500, Virginia Code 1904, which purports to give the fees of notaries, and of justices of the peace in matters not criminal, reads as follows:

Sec. 3500. Notaries and justices of the peace.

Where there is a protest by a notary, for the record thereof, making out instrument of protest under his official seal, and notice of dishonor to one person beside the maker of a note or accepter of a bill	$1 00
For every additional notice	10
For taking and certifying the acknowledgment of any deed or writing	50
For administering and certifying an oath, unless it be the affidavit of a witness, or acknowledgment of bail, or issuing process of attachment	25
For taking and certifying affidavits or depositions of witnesses, where done in an hour	75
If not done in an hour, for any additional time, at the rate per hour of	75
For every commission of lunacy upon which a justice may sit, to be paid our of the lunatic's estate	1 00
For all services which a justice may perform on the trial of warrants in which the Commonwealth is not plaintiff, including the issuing of warrants and subpœnas, swearing witnesses, taxing costs, and issuing executions, to be taxed in the costs and received as other costs are	50
For other services, the same fees as the clerk of a circuit or city court for like services. (Code 1849; p. 691, c. 184, sec. 3; 1879-80, p. 74; 1883-4, p. 55; 1902-3-4, p. 786).	

It will be noticed, in the first place, that although, if we take the heading as part of the law, the statute purports to be equally applicable to notaries and justices, yet certain items are applicable to justices alone, while the first is probably meant to apply to notaries only, and certain others are probably meant to apply equally to notaries and justices. As sec. 3500 and the preceding section (sec. 3499), stood originally in the Code of 1887, either the rule that headlines of the Code are no part of the law (*Wenonah* v. *Bragdon*, 21 Gratt. 685, 694; 2 Va. Law Reg. 94; Burks' Address, 4 Bar Assn. Rep. 111; *Iverson Brown's Case*, 91 Va. 774; *Litton's Case*, 101 Va. 851), was inapplicable to the headline of sec. 3500, or sec. 3500 was an incongruous jumble. That defect, however, was probably cured by the subsequent amendments (noted above at the foot of the section), which incorporated the headline in the amending acts. But even as the section now stands, it is not clear in its meaning and it ought to be divided into two parts, showing first, the items applicable to notaries;

and second, the items applicable to justices. If this involves repetition (as it will), repetition in statutes is much to be preferred to ambiguity.

The seventh item of the section quoted above provides that the justice, for every commission of lunacy upon which he may sit, is entitled to one dollar, *to be paid out of the lunatic's estate.* Sec. 1671a, Va. Code 1904, provides that the justices of the peace composing a commission of lunacy are entitled for their services, each, the sum of a dollar, *to be paid out of the public treasury* of the State by the auditor of public accounts, upon a proper certificate, etc. This latter act was passed the session of 1887-8, (Acts 1887-8, p. 549); and therefore if this provision is in conflict with sec. 3500, as amended by Acts 1902-3-4, p. 786, sec. 3500, as amended, must govern. And evidently where the insane person has an estate, this section will apply. But suppose the insane person has no estate, whence will come the fees for the justice then? It is reasonable to suppose that the legislature intended for the justice to be paid, and it is possible that sec. 1671, which was amended by Acts 1899-00, p. 1040, providing that all expenses incurred in committing a patient to the state hospital shall be borne by the county or corporation from which such patient is sent, may apply. *Sed quaere.* If the commission finds the person examined sane, how is the justice to be paid ? The state of the law on this point as indicated by the above provisions of three separate statutes, each apparently making a different provision for the same thing, is only one of many instances of the hopeless confusion that exists on the subject of *Costs.* (See, also, note in this number of the REGISTER on Payment of Expenses of Commissions to Ascertain Insanity.)

The last item of sec. 3500, Va. Code 1904, quoted above, is probably applicable to justices of the peace, only; though there is nothing in the section itself to show that it might not be equally applicable to notaries. Taking for granted that it applies to justices, we note that it empowers the justice to charge "for other services the same fees as a clerk of a circuit or city court for like services." The fees for clerks are *supposed* to be fixed by sec. 3505 Va. Code, 1904. It is not the purpose of the writer at this time to enter this labyrinth, for he is afraid that there is no thread to guide him back, when once he has penetrated its mystic mazes. He has entered it once with the purpose, if possible, of rescuing the fees of justices of the peace from the gloom that surrounds them, and has had to acknowledge that it is an impossible task; and when he came out, he was not surprised to read in the newspapers that some poor J. P. had been caught charging illegal fees, and fined by the court. If the prosecution was under this section (3505), the writer would like to have the opinion of the court construing the same.

Sec. 3505 is worthy, however, of some mention. It contains sixty-six items, with no orderly arrangement, alphabetical, analytical or otherwise. There is no method of telling which are applicable to justices of the peace as well as to clerks, and even those items which seem to be applicable to justices include certain duties for clerks which justices are not empowered

to perform. Some items may apply to justices, but it would take a Philadelphia lawyer in the palmiest days of the profession in that good old town to decide definitely which do so apply.

Not only are the items ambiguous, doubtful, and mixed up, but there are double provisions for the same thing; e. g., there is one item reading thus: "For issuing any other summons, or any writ not particularly provided for, and for recording the return where proper to do so, *twenty-five cents*," which is perfectly general and applies to all writs not particularly provided for; and yet on another page of the same section, we find the following: "For any other writ not hereinbefore provided for, *fifty cents*,"—a provision that was absolutely unnecessary in view of the provision first quoted.

Sec. 3505 ought to be analyzed and split up into subdivisions, and the items ought to be harmonized, and some regular system should be adopted. What good reason can be assigned for allowing two cents for writing down thirty words in one case and three for the same labor in another? Why allow, in lieu of this rate, thirty-six cents as a specific fee in one case and twenty-five cents in another? For what good reason are such different fees allowed as fifteen cents, eighteen cents and twenty cents? Thirty-five cents, thirty-six cents and thirty-seven cents? Seventy-five cents and eighty-five cents? The writer is not arguing for a reduction of the fees allowed to the clerks, but he does submit that it is puerile and nonsensical for such minute differences in fees to remain on our statute books, and that custom and habit cannot justify what is absurd and ridiculous.

If there be items in sec. 3505 applicable to justices, then another section should be added to the Code, incorporating those items; or, better still, the items should be made a part of sec. 3500, instead of having, as now, a mere reference to sec. 3505, thereby entailing upon the justice a burden that ought to be assumed by the General Assembly.

Some other questions in regard to justices' fees are hard nuts to crack. In addition to jurisdiction in civil matters and in criminal matters, the justice has many miscellaneous powers and dutes, such as, under some circumstances, to appoint election judges, to order mad dogs and sheep-killing dogs to be killed, to cause the cremation of animals dying of disease, etc.,—about twenty in all, found in different parts of the Code; and in the great majority of these cases, there is, in the act imposing the duty, no provision for the payment of the justice; and it is only by a strained interpretation of the general provisions in secs. 3500 and 3505, Va. Code 1904, that they can be made applicable to these cases. It is submitted that this is a state of affairs that demands the immediate attention of the General Assembly.

As to the justices' fees in criminal cases, the statute (sec. 3530, Va. Code 1904) is clear; but unless the provision giving the justice fifty cents for issuing a warrant of arrest is applicable in the case of a justice's issuing a search warrant, there is no provision in the law for paying the justice for issuing the same. As the search warrant commands the officer to bring

the stolen goods and the person in whose possession they are found, it would seem that the above provision is applicable, although the auditor, Col. Marye, holds otherwise; but there ought to be no doubt on such a point, and if there is a doubt, it ought to be resolved by law.

Many instances similar to the above could be enumerated, but enough has been said, we think, to show that our laws on the subject of *costs* are at many points in hopeless confusion, and that they need a thorough revision. It is suggested that the various local bar associations take the matter up, and appoint committees for the investigation of the subject, so that at the meeting of the State Bar Association, the matter may be thoroughly discussed, and if the association sees fit, a committee may be appointed to draft a proper statute to be presented to the General Assembly for its consideration. C. B. G.

PAYMENT OF THE EXPENSES OF COMMISSIONS TO ASCERTAIN INSANITY AND OF COMMITTING PATIENTS TO STATE HOSPITALS—CONFLICTING PROVISIONS IN REGARD THERETO—SECS. 1679, 1671, 1671A, 1673, 1705, AND 3500, VA. CODE 1904.—Reference has been made elsewhere in this number of the REGISTER to the fact that there are in our law three provisions for paying the fee of a justice who sits on a commission of lunacy. As the work of the last legislature is scrutinized more and more, incongruities necessarily appear; and when we consider the fact that in order for a legislator to find out the state of the law on any subject, it was necessary for him to search the Code of 1887 and the eleven volumes of the Acts of Assembly, enacted since the Code, one is not surprised that there are conflicting provisions on many subjects. It is the purpose of this note briefly to call attention to the conflicting provisions on one of these subjects.

Sec. 1671, Va. Code, 1904, which was amended by Acts of 1899-1900, p. 1040, and which has reference to the disposition of the proceedings before a commission of lunacy, and to the payment of fees, etc., provides that the two physicians on the commission shall receive a fee of two dollars and fifty cents each for their services, and that "all expenses incurred in committing a patient to any state hospital shall be borne by the county or corporation from which such patient shall be sent." Sec. 1671a, which was enacted by the Acts of 1887-8, p. 549, and which has reference to the payment of the justices of the peace, composing the commission, and the physician summoned, and other witnesses, provides that all these fees and expenses "shall be paid out of the public treasury of the state by the auditor of public accounts upon the certificate of the court of the county or corporation in which such commission of lunacy is held." Sec. 1673, which was amended by Acts 1902-3-4, p. 121, and which has reference to the conveyance of insane persons to hospitals and the payment of the expense of transportation, provides that a guard, sheriff, or sergeant, or other person appointed for the purpose, shall receive for conveying an insane person to the hospital only his actual expenses, and that "the cost of conveying insane persons to the hospital shall be paid from the funds appropriated for the

support thereof." It will be recognized at once that these statutes in part provide for the same thing, and under the rule that of statutes which are *in pari materia* the one last enacted must govern, it would seem to follow that on the subject of payment of the expenses of a commission to ascertain insanity, the state of the law is as follows:

1. The expense of transportation is governed by sec. 1673 and must be paid from the funds appropriated for the support of the hospital.

2. The fees of the two physicians on the commission of lunacy are governed by sec. 1671 and are to be borne by the county or corporation from which the patient is sent. (Quære: Suppose the two physicians do not agree and a third physician is summoned, as provided for by sec. 1669, how will the third physician be paid?)

3. If the fees to witnesses are "expenses incurred in committing a patient to any state hospital," then they are governed by sec. 1671 and are to be paid by the county or corporation from which the patient is sent; if such fees are not "expenses incurred in committing a patient to a state hospital," then they are governed by sec. 1671a, and are to be paid out of the public treasury by the auditor.

4. If the insane person has an estate, the justice's fee is governed by sec. 3500, and is to be paid out of the *lunatic's* (insane person's) estate; if the insane person has no estate, or if the commission finds the person not insane, then if the justice's fee is an "expense incurred in committing a patient to a state hospital," it is to be governed by sec. 1671, and is to be paid by the county or corporation from which the patient is sent; but if the justice's fee is not an expense "incurred in committing a patient to the hospital," then such fee is governed by sec. 1671a, and is to be paid out of the public treasury of the state by the auditor of public accounts.

It is to be noticed in this connection that sec. 1705, Va. Code 1904, provides: "There shall be paid out of the estate of any insane person to such person as the board of directors of the hospital in which he is or has been confined may designate all the expenses of his removal to or from the hospital which may have been paid out of its funds, and of his maintenance and care therein; and into the public treasury all the expenses paid thereout. The committee of such insane person, out of his estate, shall pay such expense of removal. . . ."

The state of the law on this subject forcibly illustrates what is said in another note in this number of the REGISTER, that our statutes on the subject of *costs* are in a confused condition, and that a scientific redrafting of the whole subject is a *sine qua non* to the proper administration of the laws in the Commonwealth. The publication in one work (Pollard's Virginia Code Annotated) of all our statutes serves as nothing else could to bring out their incongruities and defects, and clears the way for much valuable legislation by the next General Assembly in lopping off the crudities, reconciling the conflicts, and improving the general form, of our *lex scripta*.

C. B. G.